

Attorney Docket No.: F6179(V)  
Serial No.: 10/795,936  
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**REPLY BRIEF FOR APPELLANT**

Sir:

The following are new points of argument raised by the Examiner's Answer and Appellants' arguments in response thereto.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all fees required under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; 37 C.F.R. §1.136.

## **ARGUMENT**

The invention is directed to a farinaceous-based food product. The food product has a protein additive and a hydrophobic ester and it is dried in a manner to give a cross-section having a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification. The farinaceous-based food product is firm and not sticky after cooking.

### **The Claims Are Not Anticipated under 35 USC 102 by Ventres et al. (EP0350552)**

Claims 1, 5, 7-9, 11, and 13 were rejected under 35 U.S.C. 102 as anticipated by Ventres et al. (EP0350552). Wiley Encyclopedia of Food Science and Technology (1999) was cited as evidence for HLB value of claim 7. Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

Independent claim 1 is directed to a farinaceous-based food product comprising

- (a) about 1.0% to about 15.0% by weight of a protein additive;
- (b) about 0.25% to about 2.5% by weight of a hydrophobic ester; and
- (c) about 65.0% to about 95.0% by weight of a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein;
- (d) about 4.0% to about 18.0% by weight water;

wherein the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification.

Anticipation can only occur when each element of a claim is found, either expressly described or under the principle of inherency, in a single prior art reference or the claimed invention was known or embodied in a single reference. Kalman v. Kimberly Clark Corporation, 713 F.2d 760, 218 U.S.P.Q. 158 (Fed. Cir. 1983), cert. den., 465 U.S. 1026 (1984). Several features are found in claim 1 which are not disclosed in Ventres.

Ventres fails to disclose, among others, the following Claimed limitations and the combination thereof:

- (1) at least about 50.0% by weight of the flour mixture comprising gluten protein;
- (2) about 1.0% to about 15.0% by weight of a protein additive with sufficient specificity to constitute anticipation.;
- (3) about 4.0% to about 18.0% by weight water in the product with sufficient specificity to constitute anticipation and/or render inherent the claimed microscopy element and/or to provide enablement for the particularly claimed pasta structure as described by the microscopy parameter;
- (4) the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification.

With reference to difference (1) at least about 50.0% by weight of the flour mixture comprising gluten protein, the Office Action and Examiner's Answer refer to Applicants' Specification which discloses the limitation of at least about 50.0% by weight of the flour mixture comprising gluten protein. However, still, neither the Office Action nor the Examiner's Answer has identified a passage in Ventres that discloses a flour mixture with the presently claimed element of at least about 50.0% by weight of the flour mixture comprising gluten protein. Ventres at page 3, line 40 only refers to "glutinous flour." However, at line 47, Ventres states "There are different grades of semolina having different grades of glutinous properties." Nowhere does Ventres even make reference to a flour mixture with at least about 50.0% by weight of the flour mixture comprising gluten protein, nor that glutinous flour means one having at least

about 50.0% by weight of the flour mixture comprising gluten protein, and there can be no anticipation due to the difference (1) as stated above.

With reference to difference (2), Ventres at Claim 14 on page 15 referred to in the Office Action fails to disclose about 1.0% to about 15.0% by weight of a protein additive with sufficient specificity to constitute anticipation. The present claim 1 specifies a protein additive, which would be in addition to any protein present in the flour. Ventres Claim 14 is a comprising claim that lists multiple ingredients. Claim 14 does not require added protein, so that its concentration may be 0 or less than 1.0%, or it can be more than 15.0 % such that the claim limitation of at least 75 % flour is still met. In light of Ventres failure of sufficiently specific disclosure of added protein, there can be no anticipation due to the difference (2) as stated above.

With reference to difference (3), Ventres at p. 3, lines 10-12 (as well as p. 4 lines 3-11) fails to disclose about 4.0% to about 18.0% by weight water in the food product with sufficient specificity to constitute anticipation. Moisture content at or below 28 % could mean 0 % moisture to less than 4 % moisture, and it could mean more than 18 % moisture, both of which are not what is presently claimed. The Office Action position notwithstanding, Example 9 discloses 21.2 % wt. Extrudate Moisture. See Table III, Item 9, column 4. This is outside the range specified in claim 1. Moreover, the calculation presented in the Office Action on page 4 does not take into account the moisture content in the 4000 g flour, which takes the total moisture content well beyond the 13.7 % which is based only on the 640 g added moisture. In light of Ventres failure of sufficiently specific and enabling disclosure of water in the product, there can be no anticipation due to the difference (3) as stated above, either alone or in combination with the other missing elements.

The Examiner has failed to present sufficient basis for inherency. With reference to difference (4), the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification, the Office Action admits that it is not specifically disclosed.

Neither is there inherency. With reference to Claim 1, since all the same ingredients and process are not disclosed in Ventres as discussed above, either alone or in combination, the product does not necessarily have the same properties, and therefore there can be no inherency. Ventres is aimed at reducing the drying requirements to achieve savings in energy and time. See abstract. In contrast, the process by which the present product is produced is aimed at achieving the electron microscopy parameter specified in claim 1, which is neither disclosed nor necessarily/inherently achieved by Ventres. As evidenced by Example 2 of the present Specification, the electron microscopy parameter is process dependent and Ventres uses a different process (The Examiner admits the process is different on page 6 of the Examiner's Answer by making reference to a "similar" method). Moreover, "would have been expected" is not a proper standard for anticipation. Inherency may not be established by probabilities or possibilities. Continental Can Company, U.S.A. v. Monsanto Company, 20 U.S.P.Q.2d 1746 (Fed. Cir. 1991). In order to rely upon the doctrine of inherency, consistent judicial decisions require the identification of a basis upon which to predicate the determination that the allegedly inherent result much necessarily flow from the teachings of the applied prior art, and than one having ordinary skill in the art would have recognized the allegedly inherent result. Applicants submit and have shown that the critical microscopy parameter will vary with the exact range of ingredients and depending on processing. Accordingly, there can be neither inherency nor anticipation.

Appellants respectfully request that the anticipation rejections be overturned.

### **The Claims Are Not Obvious under 35 USC 103 over Ventres in view of Oh**

The Examiner has rejected claims 19 and 20 under *35 USC 103 (a)* as unpatentable over Ventres as cited above in view of Oh et al. (US 6,217,918). As admitted by the Examiner, while Ventres disclose a dried, uncooked alimentary pastes, Ventres do not disclose:

(5) a meal kit comprising farinaceous-based food product.

Oh et al. are directed to a microwave container containing liquid food products (sauce component).

Claim 19 is directed to a meal kit comprising the farinaceous-based food product of claim 1. Claim 20 is directed to the meal kit according to claim 19 wherein the meal kit can be heated in boiling water or a microwave oven.

Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons. Appellants submit that claims 19 and 20, specifically directed to a meal kit, are non-obvious as they depend on Claim 1 which is novel and non-obvious as discussed above. Additionally, Appellants submit that Claims 19 and 20 are separately patentable.

Appellants maintain that Ventres in view of Oh fail to disclose or suggest, among others, the following Claimed limitations:

- (4) the farinaceous-based food product has a scanning electron microscopy image that visually displays substantially no protein fiber gaps or voids at about 2000 times magnification.

The electron microscopy parameter specified in claim 1 (difference 4 discussed above), which is neither disclosed nor necessarily/inherently achieved by Ventres, is not disclosed or rendered predictable based on Oh et al. Oh is merely directed to a

microwavable container of particular geometry and does not remedy the deficiencies of Ventres.

In fact, with reference to difference (4), the claimed electron microscopy parameter, Oh et al. teach away from the present invention. Oh et al. dry freshly extruded pasta by toasting (i.e. using heated ambient air without added moisture). See Col. 2, lines 39-45. As discussed in the present Specification and comparative Example 2, this method is contrary to that of the present invention which dries pasta in the presence of moisture and which would not achieve the claimed electron microscopy parameter specified in claim 1. The method of Oh et al. confirms difference (4) which is the parameter claimed for the food product of claim 1 and its dependent claims. Appellants have shown that the claimed property of the food product is a result of particular processing conditions, and its dependent claims. The Examiner's position notwithstanding, it is sufficient to claim the property without also claiming the processing step in the meal kit claim, as this is not reading in the specification, but using the specification for evidence that the parameter will not be predictable to one skilled in the art but one that will vary depending on processing.

The Examiner's positions notwithstanding, specifically regarding the combination of references, Ventres and Oh cannot be combined for showing obviousness of the present invention, and especially not because of the teaching away in Oh as discussed above. The fact that an element of a claim (e.g. microwavable pasta packaged in a container) is disclosed somewhere in the art is not sufficient to constitute a *prima facie* case of obviousness. The invention must be viewed as a whole. The electron microscopy element, which is part of the dependent claims 19 and 20, cannot be ignored. Viewed as a whole, the present claims are non-obvious. Accordingly, the Examiner has not set forth a *prima facie* case of obviousness.

### CONCLUSION

In view of the above, Appellants respectfully submit that proper rejections under 35 USC 102(b) and 103(a) have not been made. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

Respectfully submitted,

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